

SOAH DOCKET NO. 582-11-9415
TCEQ DOCKET NO. 2011-2253-PWS-E (formerly 2010-1405-PWS-E)

EXECUTIVE DIRECTOR OF THE TEXAS	§	BEFORE THE STATE OFFICE
COMMISSION ON ENVIRONMENTAL	§	
QUALITY,	§	
Petitioner	§	
	§	
v.	§	OF
	§	
OLD TYMER ENTERPRISES, INC.,	§	
Respondent	§	ADMINISTRATIVE HEARINGS

RESPONDENT’S EXCEPTIONS TO THE PROPOSAL FOR DECISION

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON ENVIRONMENTAL QUALITY:

COMES NOW, OLD TYMER ENTERPRISES, INC., Respondent (“Old Tymer” or “Respondent”), in the above-styled and numbered cause and files this, its Exceptions to the Proposal for Decision, and would show unto the Commission as follows:

I. INTRODUCTION

1. The Texas Commission on Environmental Quality’s (“TCEQ” or “Commission”) civil fine enforcement policy violates Old Tymer Enterprises, Inc.’s (“Old Tymer”) due process rights by fining it for offenses that the TCEQ admits it did not commit.

2. Unquestionably, the Texas Water Code authorizes the TCEQ to levy fines for violations of a person’s permit or license. And it follows that the Commission may lawfully consider an alleged violator’s history and extent of previous violations. The TCEQ, however, has adopted and enforces a policy that exceeds its legislative mandate. The specific policy at issue purports to allow the Commission to “enhance” a base fine by adding a multiplier that considers the

number and types of previous violations based on the compliance history not only of the “alleged violator,” but also the compliance history related to the specific facility in question, regardless of whether the “alleged violator” had a responsible relationship with that facility at the time the previous violations occurred.

3. In other words, for enhancement purposes, it is irrelevant to the TCEQ whether a current permittee/licensee had any kind of responsible relationship to the location in question at the time of the previous violations. If the property has a history of TCEQ violations, then that compliance history follows the property forever and is used against each subsequent permittee/licensee for the purpose of enhancing any penalty that they might subsequently incur.

4. The TCEQ’s enhancement policy is unconstitutional as applied to Old Tymer because it had no responsible relationship to the property in question at the time of the earlier alleged violations, thus denying Old Tymer its due process rights by assessing fines against it for acts that it neither committed nor had the ability to contest, prevent or mitigate. Imposing a fine in any amount against a party for violations that it neither committed nor had the ability to contest, prevent or mitigate is unconstitutional; however, it is all the more egregious when the enhancement amounts can approach or even exceed the underlying fine amount.

5. In Old Tymer’s case, its base fine of \$2,500 was enhanced by an additional \$4,550 or 182% based on the location’s negative compliance history plus an additional \$350 incurred for enhancement for the recovery of avoided costs of compliance totaling \$7,370.00 in payable penalty– that is, violations and alleged violations that Old Tymer had neither the factual ability nor the legal authority to remedy or prevent when they occurred. The TCEQ’s enhancement policy is also facially unconstitutional in all instances in which parties similarly situated as Old Tymer lack a responsible relationship to a location at the time previous violations occur.

6. Old Tymer requests that the TCEQ's enhancement policy be found unconstitutional as to Old Tymer as applied, and facially unconstitutional as to all parties similarly situated to Old Tymer who have no demonstrated responsible relationship to a facility at the time previous violations occur. Old Tymer also requests that a temporary and permanent injunction be entered against the TCEQ from enforcing its enhancement policy against parties who have no demonstrated responsible relationship to a property at the time previous violations occur.

II. FACTS

7. The TCEQ is an administrative agency of the State of Texas. The Commission is empowered to initiate actions under the Texas Water Code, Chapter 7, to enforce provisions of the code, and has delegated to the executive director the authority to issue administrative orders that assess penalties and/or order corrective measures to ensure compliance with the provisions of the code within the Commission's jurisdiction and to adopt rules pursuant to these provisions.¹

8. Specifically, the Commission is empowered to levy fines pursuant to the terms of a person's permit or license.² When assessing a penalty against a person, the legislature instructed the Commission to consider certain factors, including:

(3) with respect to the alleged violator:

(A) the history and extent of previous violations;

(B) the degree of culpability, including whether the violation was attributable to mechanical or electrical failures and whether the violation could have been reasonably anticipated and avoided;

(C) the demonstrated good faith, including actions taken by the alleged violator to rectify the cause of the violation and to compensate affected persons;

(D) economic benefit gained through the violation; and

(E) the amount necessary to deter future violations; and

(4) any other matters that justice may require.³

¹ TEX. WATER CODE ANN. § 7.002 (West).

² TEX. WATER CODE ANN. §§ 7.051, 7.073 (West).

³ TEX. WATER CODE ANN. § 7.053 (West).

9. The Commission is authorized to adopt rules, regulations and policies for the purpose of enforcing environmental rules and is required to assess, update and adopt policies regarding the calculation of penalties and deterrence to prevent the economic benefit of noncompliance.⁴

10. In 2002, pursuant to the authority granted by the legislature contained in the previously referenced statutes, the Commission adopted the Second Revision to the TCEQ Penalty Policy, which provides, in pertinent part, that administrative penalties may be adjusted based on the compliance history of “the site, mobile unit, or individual who is required to be registered, certified, or licensed by the TCEQ prior to performing certain activities.”

11. The TCEQ’s Second Revision to the TCEQ Penalty Policy has been in effect since September 1, 2002, and is still in full force and effect and was the penalty policy used by the Commission to assess a fine against Old Tymer.

III. CONSTITUTIONAL DEPRIVATION – PENALTY ENHANCEMENT

12. Based on the foregoing, as applied to Old Tymer, enhancing a civil penalty based on the negative compliance history of a totally unaffiliated entity violates U.S. Const. amend. XIV, § 1., in that it denies to the plaintiff due process by subjecting it to liability for conduct that it did not have the ability to control, prevent or mitigate.

13. A due process claim requires a two-part analysis: (1) the court must determine whether a plaintiff has a liberty or property interest that is entitled to procedural due process protection; and (2) if so, the court must determine what process is due.⁵ A liberty interest entitled to due process protection “[d]enotes not merely freedom from bodily restraint but also the right of the individual

⁴ TEX. WATER CODE ANN. § 7.006(b) (West).

⁵ *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1153–54, 71 L.Ed.2d 265 (1982); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569–70, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).

to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of one's own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men.”⁶ Because a monetary penalty constitutes the deprivation of private property, unquestionably Old Tymer has a liberty interest implicated by the TCEQ’s enhancement policy.⁷

14. Once the due process guarantee applies, the court must next determine what process is due.⁸ The U.S. Supreme Court has held that with respect to strict-liability regulatory statutes, an omission or failure to act is a sufficient basis for a responsible corporate agent's (or corporation's) liability.”⁹ The question is whether a corporation or its agents had the power to prevent the act complained of – that is, the state must show that the corporate agent or corporation have a responsible share in the furtherance of the transaction which the state outlaws.¹⁰

15. It follows that when a party bears no responsible relationship to the complained-of conduct (in this case, the compliance history), and was therefore outside the class of persons whose conduct is clearly proscribed by the statute, their due process rights are violated if they are punished for the complained-of conduct.¹¹ And that is precisely how the TCEQ has applied its rules to Old Tymer, notwithstanding the fact that the statutory authority upon which it relies only

⁶ *Roth*, 408 U.S. at 572, 92 S.Ct. at 2706–07 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923)).

⁷ See *id.*

⁸ *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

⁹ See *United States v. Park*, 421 U.S. 658, 669, 95 S. Ct. 1903, 1910, 44 L. Ed. 2d 489 (1975).

¹⁰ *Id.*

¹¹ See *id.*

allows it to consider “the history and extent of previous violations” “with respect to the alleged violator.”¹²

16. Instead of enforcing its rules pursuant to statutory authority and in compliance with the U.S. Constitution, the Commission freely admits that the entity it is punishing is not a responsible party with respect to its 182% enhancement. By virtue of this admission, it is clear that Old Tymer had no power to prevent the earlier acts complained of, and, therefore, cannot lawfully be punished for them.

17. Based on the foregoing authority, the TCEQ’s 182% enhancement of Old Tymer’s base fine violates Old Tymer’s due process rights and it requests that this Commission reject the Honorable Administrative Law Judge’s recommendation related to the enhancement portion of Old Tymer’s fine and reduce it to zero.

IV. INSUFFICIENT EVIDENCE – BASE FINE

18. Moreover, as stated at the hearing, the TCEQ does not even need to reach a decision on the legality of the agency’s Penalty Policy because the ED failed to establish that Old Tymer was operating a public water system **on the dates** Old Tymer allegedly violated the agency’s rules. Old Tymer steadfastly asserts that the base fine should be denied as there is no evidence to suggest that Old Tymer operated a public water system. And it thus follows that if there is insufficient evidence of a violation to support a base fine, no enhancement fine can be levied.

V. CONCLUSION

The Honorable Administrative Law Judge recommends an unconstitutional penalty enhancement based on an unconstitutional penalty policy adopted by this Commission.

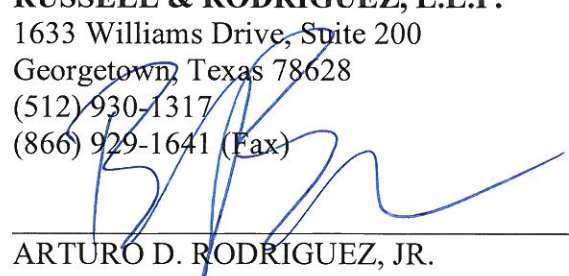
¹² See TEX. WATER CODE ANN. § 7.053(3)(A) (West).

Certainly, Respondent recognizes that it is the Commission's responsibility to protect the environment and deter violators from simply adopting a new assumed name and continuing to operate business as usual when that business continues to violate environmental standards. But with all due respect, neither the state nor this Honorable Commission can ignore basic due process protections guaranteed by the United States Constitution. Punishing Respondent for violations committed by a wholly unrelated business entity that occurred when Respondent had no relationship whatsoever to the site in question unquestionably violates Respondent's due process rights. The Honorable Administrative Law Judge's recommendation may comport with Commission policy, but when that policy violates basic constitutional protections, it is time to reexamine that policy.

Finally, the ED failed to establish by a preponderance of the credible evidence that Old Tymer operated a public water system on the dates alleged in the ED's petition and thus, no fine should be levied in the first instance.

WHEREFORE, PREMISES CONSIDERED, Old Tymer Enterprises, Inc. requests that this Honorable Commission deny the Honorable Administrative Law Judge's proposal for decision to fine Old Tymer in the amount of \$7,370.00, deny the proposal to assess an underlying fine, and deny the proposal to assess a penalty enhancement, and for such further relief to which it may be justly entitled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of September, 2012, a true and correct copy of the foregoing document has been sent via facsimile, first class mail, or hand-delivered to the following counsel of record:

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September 6, 2012

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From: Bradford Bullock

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Pages: 10 (Including Cover Sheet)

Re: *Executive Director of the Texas Commission on Environmental Quality,
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2011-2253-PWS-E (Formerly 2010-1405-PWS-E) SOAH Docket No. 582-11-
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Comments: Respondent's Exceptions to the Proposal for Decision

Broadcast Report

P 1
09/06/2012 13:48
Serial No. AOP2011007800
TC: 83536

Addressee	Start Time	Time	Prints	Result	Note
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15122393434P18600	09-06 13:39	00:02:02	010/010	OK	
15122396377P18600	09-06 13:42	00:02:55	010/010	OK	
15122393311P18600	09-06 13:45	00:02:20	010/010	OK	

Note TMR: Timer TX, POL: Polling, ORG: Original Size Setting, FME: Frame Erase TX,
MIX: Mixed Original TX, CALL: Manual TX, CSRC: CSRC, FWD: Forward, PC: PC-Fax,
BND: Double-Sided Binding Direction, SP: Special Original, FCODE: F-code, RTX: Re-TX,
RLY: Relay, MBX: Confidential, BUL: Bulletin, SIP: SIP Fax, IPADR: IP Address Fax,
I-FAX: Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF,
TEL: RX from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer,
Refuse: Receipt Refused, Busy: Busy, M-Full: Memory Full,
LOVR: Receiving length Over, POVR: Receiving page Over, FIL: File Error,
DC: Decode Error, MDN: MDN Response Error, DSN: DSN Response Error.

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